In *Henry v. Hammond* the defendant was employed to carry out an ordinary commercial transaction in the way of his business as a shipping agent, and Channell, J. adopted the observation of Bramwell, L.J. is *New Zealand and Australian Land Co. v. Watson,*[4] that he would be very sorry to see the intricacies and doctrines connected with trusts introduced into commercial transactions. It was on this basis that Channell, J. held that the defendant as a shipping agent was not bound to keep the money of each of the persons by whom he is employed in the course of that business separate, and that Limitation was a good defence.

In the present case, it cannot be suggested that the collection of income from, and the sale of the rubber land, as agent for the plaintiff, was a transaction in the ordinary course of the business of the deceased as a chettiar. Consequently, the above principles laid down by Channell, J. have no application.

It is, I think, common ground that the deceased was an agent to collect the income from the rubber estate, and for the sale of the plaintiff's land which he held in trust.

The deceased was, therefore, on the authority of cases like *Soar v. Ashwell,*[3] and *Burdick v. Garrick,*[1] an express trustee. He received the income as trustee: he sold the land as trustee: he received the proceeds of the sale as trustee for and on behalf of the plaintiff.

This state of things having been shown to exist, it may be presumed under Section 114 of the Evidence Enactment, Illustration (d) that it continued to exist till the contrary is shown. The onus was on the defendant to prove that the relationship of trustee and *cestui que trust* had terminated, and that a new relationship of debtor and creditor had come into being.

The deceased's letter of 13th September 1926, is, in my opinion an admission that he was holding the proceeds of the sale of the land in trust for the plaintiff.

The defendant relies on the arrangement mentioned in para. 6 of the plaint, that the deceased could borrow the money, and use it in his business of moneylending. The mere fact that the deceased was given permission to borrow the money, cannot, in my view, by itself put an end to the relationship of trustee and *cestui que trust.* It must be proved clearly that the deceased did in fact borrow the money in pursuance of the arrangement, and thereby put an end to his trusteeship. This has not been done. The books of account of the deceased might have thrown some light on this; but as they were not produced the Court is entitled to presume that these would be adverse to the defendant's contention.

I am therefore satisfied that the deceased was a trustee for a specific purpose, and that he could only discharge himself by handing over to the plaintiff (as the person entitled) the moneys which came into his hands as such trustee, and that the plea of Limitation cannot be set up.

I give judgment for the plaintiff in terms of Prayer (1) and, falling agreement between the parties, order that an account be taken by the Deputy Registrar of this Court.

Under Prayer (2), I give judgment for the plaintiff for the sum of $1,100.00 from which the defendant is entitled to set off the sum of $540.19 (for which the plaintiff has not given credit) on the taking of accounts.

With regard to Prayer (3), I allow punitive interest at the rate of 6% per annum on the sum found to be due to the plaintiff on Prayers (1) and (2).

As to Prayer (4), I allow interest on the total sum found to be due to the plaintiff from date of judgment to the date of payment, also at the rate of 6 per cent per annum.

The plaintiff will have the costs of the suit.

Judgment for the plaintiff.

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J. S.S., GORDON-SMITH, Ag. J.A. & HORNE, J.

January 17, 1941.

YONG JOO LIN, YONG SHOOK LIN AND YONG LOO LIN

Plaintiffs (Appellants)

vs.

FUNG POI FONG

Defendant (Respondent).

[CIVIL APPEAL No. 7 of 1940]

Easement of support—Presumption of lost modern grant—Acquisition of easement of support after uninterrupted user for twenty years possible in the F.M.S. —Land Code 1926—Civil Law Enactment S. 2—Specific Relief Enactment 1903.

The plaintiffs alleged that after thirty years or more user they have a right to support for their buildings as against the defendant who was the owner of the servient tenement and that this right had been infringed by the defendant. The defendant argued that the Common law doctrine, which presumed that an easement of support has been lawfully acquired after proof of uninterrupted user for twenty years, did not apply to the Federated Malay States because of the Statute law prevailing there, and that the Land Code of 1926 is "such other provision" as to exclude the common law right of support which is **prima facie** applicable by virtue of S. 2 of the Civil Law Enactment;

Held, (1) that the common law doctrine of the presumption of a lost modern grant applies in the Federated Malay States and that an easement of support can be lawfully acquired after twenty years or more uninterrupted user;

(2) that there is nothing in the Land Code 1926 to prevent the application of the common law by virtue of S. 2 of the Civil Law Enactment.

CIVIL APPEAL.

Shearn and *Charlesworth* for the plaintiffs (appellants).

Roland Braddell and *Bostock-Hill* for the defendant (respondent).

Cases referred to:

(1) *Dalton v. Angus,* 6 A.C. p. 740.
(2) *Wheaton v. Maple & Co.,* 1893 3 Ch. 48.
(3) *Commissioner of Stamps, S.S. v. Ooi Tjong Swan,* 1933 A.C. 378.
(4) *Haji Abdul Rahman v. Mohamed Hassan,* 1917 A.C. 209.
(5) *The Attorney General v. Lim Chin Swi,* (1904) 9 S.S.L.R. p. 6.
(6) *Ohna Mohamed Abubakar v. Tho Yan Poh,* 13 S.S.L.R. 39.
(7) *Angullia v. Ong Boon Tat & Others,* 15 S.S.L.R. 190.
(8) *Kilgour v. Geddes,* 1904 1 K.B. 457.
(9) *Motor Emporium v. Arumugam,* 1933/4 F.M.S.L.R. 21.
(10) *Bonomi v. Backhouse,* 1 E.B. & E. 655.
(11) *Angus v. Dalton,* 4 Q.B.D. at p. 172.
(12) *Cross v. Lewis,* 2 B. & C. p. 686.
(13) *Moor v. Rawson,* 3 B. & C. pp. 332 & 340.
(14) *Lemaitre v. Davis,* 19 Ch. D. 281.
(15) *Bower v. Peate,* 1 Q.B.D. 321.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Terrell, Ag. C.J. (S.S.)—The plaintiffs are the executors of one Yong Nee Chai who purchased No. 19 Cross Street, Kuala Lumpur, in 1905. It was originally a one-storied house. Adjoining it was No. 21 Cross Street which appears to have been built subsequently to No. 19. At some period before 1910, No. 19 was converted into a two storied house, and for this purpose the outside wall of the top storey of No. 21 was utilised. The defendant acquired No. 21 in 1936. It was then held under three Certificates of Title which were surrendered in 1938, and one Certificate was issued to the defendant (Exhibit P3). About the beginning of 1939 defendant demolished No. 21, and as a result of the removal of the wall adjoining No. 19, and of the excavations which caused one of the brick piers of No. 19 to slip, No. 19 became unsafe for habitation, and the Sanitary Board obtained an order for its demolition.

So far the facts are not in dispute. The plaintiffs also allege that in removing the wall the defendant trespassed on the plaintiffs' land to the extent of a few inches. With this allegation I will deal later. The plaintiffs claim that after thirty years' or more user they have a right of support which has been infringed by the defendant. Alternatively they claim damages for trespass.

The trial took place before the learned Chief Justice who held that, if English law were applicable, the plaintiffs would be entitled to succeed. He found, however, that, in view of the provisions of the Land Code the Common Law of England could not be applied. He also found that the alternative claim in trespass had not been established. The plaintiffs' claim was accordingly dismissed, and they have appealed.

Principles of English Law have for many years been accepted in the Federated Malay States where no other provision has been made by statute (see for instance, *Motor Emporium v. Arumugam,*(9)). Section 2 (i) of the Civil Law Enactment, therefore merely gave statutory recognition to a practice which the Courts had previously followed. The material parts of the section read as follows:

> "Save in so far as other provision has been or may hereafter be made by any written law in force in the Federated Malay States, the Common Law of England, and the rules of Equity, as administered in England at the commencement of this Enactment, other than any modifications of such law or any such rules enacted by Statute, shall be in force in the Federated Malay States; Provided always that the said Common Law and rules of Equity shall be in force in the Federated Malay States so far only as the circumstances of the Federated Malay States and its inhabitants permit and subject to such qualifications as local circumstances render necessary."

It will be seen that there are three qualifications to the adoption of the English Common Law in the Federated Malay States:

(1) It only applies if there is no other statutory provision in the F.M.S.

(2) If it applies, it applies unmodified by any English Statute.

(3) It must be applied only so far as the circumstances of the Federated Malay States and its inhabitants permit, and subject to such qualifications as local circumstances render necessary.

The first of these qualifications will be considered later in connection with the Selangor Land Regulation of 1891, the Registration of Titles Enactment of 1911 and the Land Code of 1926.

As regards the second qualification, comparison may be made with the application of the English Common Law to the Colony, where by virtue of the Charters the English Common Law applies with such statutory modifications as existed in 1826. So far as concerns the matters in issue in this action, the result is that the Prescription Act of 1832 applies neither in the Federated Malay States nor in the Colony.

The third qualification appears to me to be of considerable importance when the presumption of a lost grant comes to be considered. If the rule of the Common Law is that there must have been an actual grant, even though lost, then, if the Register of Titles in the Federated Malay States or the Register of Deeds in the Colony proves conclusively that no such grant was ever made, there can be no right of support in either jurisdiction. If, however, the rule is merely that the right must, after a lapse of twenty years, be presumed to have had a lawful origin, whether resting on the fiction of a lost grant or otherwise, then an actual grant need not be predicated, and the argument built on the absence of registration falls to the ground. If by the Common Law a right of support for buildings arises after twenty years' uninterrupted user, it is surely carrying legalism too far to rest that right on a fiction which the Courts of Common Law found convenient in England, and then negative such right because of the particular requirements of the Registration of Titles under the Land Code, and of the Registration of Deeds Ordinance in the Colony. If the principles of law laid down by the House of Lords in *Dalton v. Angus,*[1] permit of an alternative explanation of the origin of the right of support, it would appear to be more in accord with equitable principles to adopt such explanation in the Federated Malay States, and thereby apply the rules laid down by *Dalton v. Angus*[1] with the qualifications rendered necessary by the existence of a Register of Titles. It appears to be that such a method of approach is preferable to that of treating the right of support as having no possible foundation except in grant, and then negativing such right because no such grant is disclosed in the Register.

The scope and nature of the Common Law right of support were settled by the decision of the House of Lords in *Dalton v. Angus,*[1]. In order to appreciate what the case decided it is necessary to examine shortly the history of the litigation. The action was brought by Angus & Co., the owners of a factory which had been in existence for 27 years, for the damage resulting from the excavation of the neighbouring land. The trial was held before Lush, J. who directed judgment to be entered for the plaintiffs. The ruling of the learned Judge which ultimately was in question in the House of Lords is quoted by Lord Penzance at p. 803 of the report, and is in the following terms:—

> "The authorities oblige me to hold, that when a building has stood for twenty years it has acquired a right to the support of the adjacent land, and I do not think that it all depends upon whether the opposite or adjacent neighbour had notice, or not, of what was done, or what weight was put upon it, nor does it rest on the fact of there being an implied grant. I think it has become absolute law, that when a building has stood for twenty years, supported by the adjacent soil, it has acquired a right to the support of the soil; and no one has a right to take all that soil without putting an equivalent to sustain the building. That is the ruling which I must lay down here, because that is upheld by many authorities."

On an appeal to the Queen's Bench Division, the Court (Cockburn, C.J. and Mellor, J., Lush, J. dissenting) ordered judgment to be entered for the defendants. The Court of Appeal (Cotton and Thesiger, L.JJ., Brett, L.J. dissenting) reversed this judgment, and ordered that the defendants might elect within 14 days to have a new trial. If they did not so elect judgment was to be entered for the plaintiffs. The defendants appealed to the House of Lords before which the appeal was twice argued. The second hearing was in the presence of seven Judges in addition to five members of the House of Lords. Five questions were put to the Judges of which the following are material:—

1. Has the owner of an ancient building a right of action against the owner of lands adjoining if he disturbs his land so as to take away the lateral support previously afforded by that land?

2. Is the period during which the Plaintiffs' house has stood, under the circumstances stated in the case, sufficient to give them the same right as if the house was ancient?

5. Was the course taken by the learned Judge at the trial, of directing a verdict for the plaintiffs, correct, or ought he to have left any question to the jury?

In their judgments the first two questions were answered in the affirmative by all seven Judges, though they differed in their reasons. The fifth question was answered by Pollock, B., Field, J., Manisty. J. and Fry, J. in the affirmative and by Lindley, Lopes and Bowen, JJ. in the negative.

It will be seen that the ruling of Lush, J. involved the proposition that after twenty years a building acquires an absolute right to the support of the adjacent soil, that this proposition was forced upon him by the authorities, and that all the Judges who were summoned to the House of Lords affirmed the proposition that, in the case before the Court, uninterrupted enjoyment of the right of support for over twenty years gave the same right as if the house were ancient.

In the House of Lords the Lord Chancellor, Lord Selborne, dealt with the history of the right of support, and pointed out the difference between the natural support of soil by soil, which he described not as an easement held by a distinct title, but as an incident to the land itself, *sine quo res ipsa haberi non debet* (p. 791). He then points out that the support to buildings cannot exist *ex jure naturae,* and that it must in each case be acquired by grant or by some means equivalent to grant. He then quotes with approval the judgment of the Exchequer Chamber in *Bonomi v. Backhouse,*(10) as delivered by Willes, J. at p. 655 where he said:

> "The right to support of land and the right to support of buildings stood upon different footings, **as to the mode of acquiring them, the former being prima facie** a right of property analogous to the flow of a natural river, or of air,....while the latter must be founded upon prescription or grant, express or implied, **but the character of the rights, when acquired, is in each case the same.**"

The same passage is referred to with approval by Lord Blackburn at p. 809, and as Lord Watson expressed his agreement with the judgment of Lord Selborne, and Lord Coleridge his agreement with the judgments both of Lord Selborne and Lord Blackburn, there can be no doubt that when once an easement of support for buildings has been acquired, it becomes in effect a right of property incident to the land itself.

Lord Selborne was of opinion that a right of support was not merely a negative easement, but also had the characteristics of a positive easement, and fell under the second section of the Prescription Act. With this finding we are not concerned, since, as stated above, the Prescription Act is not law in the Federated Malay States. That was, however, not his only finding, and on p. 800 the judgment continues as follows:—

> "Supposing, however, that the Second Section of the Prescription Act ought not to be held to apply to the easement of support, the same result would practically be reached by the doctrine, that a grant, **or some lawful title equivalent to it,** ought to be presumed after twenty years' user. As to this, I think it unnecessary to say more than that I agree with the view of the authorities taken by Lush, J., by the majority of the Judges in the Court of Appeal, and by all the learned Judges who attended this House (unless Bowen, J., who preferred to rely upon the equitable doctrine of acquiescence, is an exception) in their answer to the first two questions proposed to them by your Lordships."

Now it will be remembered that Lush, J. took the view that the authorities compelled him to hold that after twenty years' undisturbed enjoyment the right of support was an absolute right, and he reached that conclusion independently of any theory of a lost grant which may have been called in aid to support it. This was also the view of at least four of the Judges who expressed their opinions, and in the passage just quoted Lord Selborne definitely states that he agrees with the view of the authorities taken by Lush, J. and the majority of the Judges who attended the House of Lords. With this proposition Lord Penzance agrees on p. 803, and Lord Blackburn at p. 810. There is accordingly ample authority for the proposition that after undisturbed enjoyment for twenty years the dominant tenant has a right of support for his building similar in every respect with the right of support of soil by soil which exists *ex jure naturae.*

If this view of the law is correct, a Common Law right of support for buildings comes into existence after twenty years' uninterrupted user, and the theories and fictions by means of which the Courts of Common Law in England gave effect to that right, are something quite distinct from the right itself. All that is necessary is that the right having been recognised, should be deemed to have had a lawful origin. This is fully established in the passage from Lord Selborne's judgment quoted above, in which he speaks of the presumption of a grant or *some lawful title equivalent to it* after twenty years' user. A lost grant, therefore, is not essential to the Common Law right of support. The reason for the invention of the fiction of a lost grant was, as pointed out by Bowen, J. at p. 780 of the report, that the Courts of Common Law, which tried questions of this kind, were hampered by the barriers between law and equity, and were precluded therefore from giving a 'lawful', as opposed to a 'legal', explanation of the right. If the English Common Law is to be applied to the Federated Malay States, there is no reason why the Courts of the Federated Malay

States should feel bound by the difficulties which beset the Courts of Common Law in England before the passing of the Judicature Act.

There are, however certain limitations upon the acquisition of the right. An incapacity on the part of the owner of the servient tenement will rebut the presumption that an easement of support had a lawful origin. *Wheaton v. Maple,*[2] at p. 62. The same case also decides that a right cannot be established against lessees, and that an easement, if acquired by prescription either at Common Law or under the Statute, must be absolute, and not for a term of years.

The more correct view, therefore, would appear to be that uninterrupted user for twenty years raises a presumption that an easement of support has been lawfully acquired, and that this presumption can be rebutted by proving that the owner of the servient tenement had been precluded either by incapacity, or by the nature of his title, from conferring the right of support. It is, however, equally clear that the presumption could not in England be rebutted by proving that a grant had not in fact been made (see per Thesiger, L.J. in *Angus v. Dalton,*[11] and per Lord Blackburn in *Dalton v. Angus,*[1].

It is now necessary to consider the nature of the plaintiff's and the defendant's titles under the statute law prevailing in Selangor, and further to consider whether the Land Code of 1926 is such 'other provision' as to exclude the common law right of support which is *prima facie* applicable by virtue of section 2 of the Civil Law Enactment.

It was one of the contentions of the defendant that registered titles in Selangor were altogether of such a different character to a fee simple that the Common Law doctrine of a right of support was in any case inapplicable. The defendant's title originally consisted of three Certificates of Title (Exhibits P4, P5 and P6) issued to one Jee Seong under the provisions of the Selangor Regulation 3 of 1891, and the Selangor (Registration of Titles) Regulation 4 of 1891. It appears that under previous regulations leases of State land had been issued for 99 or 999 years, but the titles in question are clearly grants in perpetuity, subject to the payment of an annual rent, and subject to the conditions expressed in the grant or implied in the Regulations. There were no express conditions. The rent is a first charge on the land which after due notice may be sold for payment of the arrears. It is incorrect to treat the State as the reversioner. The similarity between a certificate of title and a fee simple is that in each case it is a title in perpetuity, and I cannot think that the reservation of a rent derogates from the absolute title granted. Many estates held in fee simple in England are subject to rent charges in perpetuity, or fee-farm rents (see Hailsham Vol. 27, p. 611, note (a), and Cheshire's Modern Real Property, 4th Edition, p. 315). The instrument creating the rent-charge may contain a condition of forfeiture, and the rights of the grantee of a rent-charge are especially referred to in section 146 (5) (a) of the Law of Property Act, 1925. The creation of a rent-charge issuing out of land does not, however, derogate from the owner's title as that of an owner in fee simple. In substance therefore there would appear to be no difference between a fee simple and a grant in perpetuity.

It was also contended that by virtue of the surrender of the defendant's titles in 1938, and the issue of a new Certificate of Title (Exhibit P3), the land vested in the Ruler of the State under section 102 (ii) of the Land Code of 1926, and the title of the proprietor became extinguished. In substance the surrender merely operated to give the defendant a single Certificate of Title under section 56 of the Land Code of 1926 in lieu of the three Certificates of Title under the Regulation of 1891, and the surrender and the new Certificate were dated the same day. It would, therefore, be a pure technicality if the defendant, by an arrangement made for his own convenience, were able by this means to divest his land of obligations, if any, to which it was subject prior to the surrender. It would be more in accordance with equitable principles to hold that land could only be surrendered subject to any existing obligations and that the State likewise could only regrant what had been surrendered (see per Lindley, L.J. in *Wheaton v. Maple & Co.*[2]). For instance, section 42 (iv) provides that the title of an unregistered lessee for a period not exceeding one year shall prevail over that of a person who becomes a registered proprietor. In view of this subsection it can scarcely be argued that a surrender to the State would have defeated the title of a lessee in possession. The surrender would be subject to the unregistered lease, and the new title would likewise be subject thereto. In my opinion the plaintiffs' claim to a right of support is not affected in any way by the surrender.

Under the Land Code of 1926 there is no machinery for the registration of easements other than a right of way under section 103 (vii), but in such case the right of way is only registered against the title of the servient tenement. There is no provision for registering upon the title of the dominant tenement any memorandum to the effect that the proprietor

is entitled to the easement. Under the previous legislation it would appear that easements could be created and placed upon the register, since section 27 of the Registration of Titles Regulation of 1891 and section 29 of the Registration of Titles Enactment both provide for the transfer of registered land containing "a memorandum of all rights of way and easements intended to be conveyed". It is also admitted that prior to the 1926 Code an unregistered claim to an easement might be protected by caveat under section 68 of the Regulation, or section 70 of the 1911 Enactment. It should be observed, however, that although it was then possible for a proprietor to protect his interests by registering a caveat, he was under no obligation to do so. The document of title was not, therefore, conclusive that there were not unregistered interests in the land in existence. In the 1926 Code, on the other hand, there is no provision for transferring a registered easement, or protecting an unregistered easement by caveat.

Reference can also be made to the Limitation Enactment. The Federated Malay States originally adopted in 1885 the Colony Limitation Ordinance which was founded on the Indian Limitation Act of 1859. The Indian Act makes provision for the acquisition of easements by prescription, but these particular articles were omitted from the Colony Ordinance, and consequently from the F.M.S. Enactment. The legislation in the Federated Malay States, however, previous to 1926 contemplated that a possessory title under the Limitation Enactment adverse to that of the registered proprietor might be obtained by long possession (see section 7 of the 1891 Regulation and section 8 of the 1911 Enactment). In the 1926 Code there was a new provision, section 43, providing that no title to land adverse to that of the proprietor could be obtained by long possession.

The position then is that under the 1926 Code there was no power to put an easement (other than a right of way) on the register, and that only in the case of the servient tenement, and no power to protect an unregistered easement by caveat. The defendant relies strongly on section 42 (1) of the Land Code of 1926 which declares that the title of the proprietor shall be indefeasible except as in that section provided. The plaintiffs, on the other hand, maintain that, if they are entitled to the benefit of a right of support, their rights are specifically protected by section 42 (vi) which is as follows:—

> "Nothing in this section shall be construed so as to prevent the title of any proprietor being defeated by operation of law."

There was nothing in the previous legislation in any way corresponding to this subsection, and it is argued that this provision was inserted on purpose to protect interests in land which arose by operation of law, and which could no longer be protected by registration or by caveat. Considerable force is lent to this argument by a reference to section 54 of the Specific Relief Enactment which deals with mandatory injunctions. Illustration (a) reads as follows:—

> "A. by new buildings obstructs lights to the access and use of which B. has acquired a right by prescription. B. may obtain an injunction not only to restrain A. going on with the buildings, but also to pull down so much of them as obstructs B's lights."

The Specific Relief Enactment came into force in 1903, and was based on the Specific Relief Act of India. The corresponding illustration in the Indian Act reads as follows:—

> "A. by new building obstructs lights to the access and use of which B. has acquired a right under the **Limitation Act Part IV** etc."

From this it may be inferred that the legislature being fully aware that in the Limitation Enactments of the Federated Malay States the reference to easements had been omitted, nevertheless recognised that easement might be acquired by prescription.

Nor can it be argued that the situation was altered in 1926, and that it is inadmissible to interpret the Land Code in the light of an illustration in a previous Enactment. The Land Code itself (Enactment 24 of 1926) contained ten different amendments to the Specific Relief Enactment. The effect of this is that the Specific Relief Enactment must be deemed to have been re-enacted simultaneously with the Land Code, that the possibility of acquiring an easement by prescription was recognised, and that there is accordingly the strongest presumption that the acquisition of an easement is not inconsistent with the provisions of the Land Code itself. Counsel for the respondent did not suggest that the illustration in section 54 of the Specific Relief Enactment had been left standing 'per incuriam'. In fact it was not open to him to do so in view of the very definite ruling given by the Privy Council in *Commissioner of Stamps, S.S. v. Ooi Tjong Swan,*[3] at p. 389.

> "Their Lordships can lend no countenance to such a method of treating a statutory enactment."

The only explanation that the respondent could give of section 42 (vi) was that it referred to various circumstances by which the title of the proprietor could be defeated under the provisions of the Land Code itself. Mr. Braddell referred the Court to several

sections relevant to this argument. Under section 30 (iv) if the proprietor is dead, and no legal personal representative has been appointed, the property reverts to the State. Under section 37 (i) land may be forfeited for breach of any condition, express or implied. Under section 102 (ii) the proprietor's title is extinguished on surrender. Under Part XVIII land may be sold for non-payment of rent, and under section 217, if no sufficient bid is received, the land can be forfeited to the State, and section 240 provides for rectification of the Register by Order of Court. The answer to this argument is that all the provisions referred to appear in the same or in a similar form either in the Land Code of 1911 or the Registration of Titles Enactment of 1911, and that the sections themselves provide for the defeasance of the registered proprietor's title in the particular circumstances referred to. It was not found necessary in the 1911 Enactments to have any provision corresponding to section 42 (vi), and the provisions above referred to would be equally effective in the 1926 Code without section 42 (vi). It must, I think, be presumed that the legislature would not have inserted a provision which, if Mr. Braddell's argument is accepted, would be redundant and unnecessary. The inference, therefore, is that the subsection was inserted for some other purpose, that purpose being the protection of interests which could previously have been protected by a caveat or by some memorandum on the Register. So far as easements are concerned the title of the proprietor would not of course be defeated absolutely, but only *pro tanto,* but, in my opinion, the words would cover this eventuality without giving them any forced construction.

It was pressed upon the Court that the Land Code is comprehensive and conclusive, and that a registered title being *prima facie* indefeasible, can only be defeated where the Land Code itself so provides. I think, however, that this contention is too wide. It appears to me that the Register is only conclusive as to things that can be registered. Reference may be made to the decision of the Privy Council in *Haji Abdul Rahman v. Mohamed Hassan,*[4] which is quoted by the learned Chief Justice in support of the proposition that the Register was conclusive. In that case an unregistered agreement relating to land in Selangor was under consideration. At p. 214 the judgment reads:—

> "Now the agreement under discussion was not in the form of Schedule E and therefore could not be and was not registered. It is therefore clear that it conferred no real right in the land which remained after the transfer duly registered as the unburdened property of the defendant. But when that is said section 4 (of the Registration of Titles Regulation of 1891) has no further application. It does not profess to prohibit or strike at contracts in reference to land, provided that such contracts cannot be construed as attempting to transfer, transmit, mortgage, charge or otherwise deal with the land itself."

It follows from this that the title of the registered proprietor may be indirectly affected, or even defeated, by an unregistered contract to which he is a party and which is binding on him.

There are various other matters in which the register is not conclusive; the case of an unregistered lease for less than a year when the tenant is in possession has been referred to above, and is protected by section 42 (v) of the Land Code. So far as easements are concerned, I have already pointed out that although a right of way may be registered against a servient tenement, there is no machinery for registering it on the title of the dominant tenement. So far, therefore, as the latter is concerned, the proprietor is entitled to an additional incorporeal hereditament which does not appear on the Register.

The right of support of soil by soil may possibly be more correctly described as an incident of property rather than an easement. The fact remains, however, that a burden or obligation is placed on the adjoining owner which to that extent derogates from his indefeasible title.

Perhaps the most important exception to the conclusiveness of the title is afforded by cases where there is an implied easement of support. The circumstances under which such a right would arise are succinctly stated in the judgment of Lord Selborne in *Dalton v. Angus,*[1] at page 792:—

> "If at the time of the severance of the land from that of the adjoining proprietor it was not in its original state, but had buildings standing on it up to the dividing line, or if it were conveyed expressly with a view to the erection of such buildings, or to any other use of it which might render increased support necessary, there would then be an implied grant of such support as the actual state or the contemplated use of the land would require, and the artificial would be inseparable from, and (as between the parties to the contract) would be a mere enlargement of the natural."

Mr. Braddell admitted that in the Federated Malay States there might be implied easements of three kinds:—

(i) a right of way of necessity;
(ii) a right of support where adjoining houses had previously been in one ownership;
and (iii) where the owner divides land into building lots and sells them on a covenant to build.

When once it is admitted, as I think it must be admitted, that such implied easements can exist, it follows that the register is not conclusive, and that a

proprietor may be entitled to benefits, and that his land may be subject to burdens and obligations, which do not appear upon his title. That being so, the argument that a right of support after twenty years' enjoyment cannot be recognised because of the conclusiveness of the registered title, becomes untenable.

I conclude, therefore, that there is nothing in the Land Code which expressly prevents the acquisition of an easement of support. On the contrary the inference from section 42 (vi) of the Land Code, and illustration (a) to section 54 of the Specific Relief Enactment, lend support to the suggestion that easements can be acquired and enjoyed. The Land Code does not, therefore, constitute such 'other provision' as would exclude the operation of section 2 of the Civil Law Enactment.

In the view I have taken of the Common Law right of support I see no difficulty in applying such right in Selangor. It may be that the right of support for buildings is an incorporeal hereditament which after twenty years must, within the limits referred to above, be presumed to have had a lawful origin. It is a right which is incapable of being registered and the want of registration, therefore, does not affect the matter. Or it may be that after twenty years' enjoyment the right of support for buildings takes on the character of the natural right of support of soil by soil, and should be regarded as an incident of property. In either case I think that the right, if established in circumstances in which it could be established in England, should be given effect to in the Federated Malay States.

I would refer shortly to the three cases in the Colony which have a certain relevance, subject only to the difference that in the Colony there is a system of registration of deeds and not of titles. The first of these cases was *The Attorney General v. Lim Chin Swi,*[5] decided by Cox, C.J. in 1904. The Crown claimed an injunction to restrain the defendant from interfering with a right of light which they had enjoyed for over twenty years. The learned Chief Justice decided the case on the assumption that twenty years' uninterrupted enjoyment of an easement did not create an absolute right but merely raised the presumption of a lost grant, which was negatived by the fact that such grant to be effective would have had to be registered in the Registry of Deeds, and that since the Register disclosed no such grant, the presumption was necessarily rebutted. The learned Judge considered the case of *Dalton v. Angus,*[1] at length, but in support of the proposition that easements of light and support at common law depended on the presumption of a lost grant which could be rebutted by proving that it was never made, relied on the judgments of Cockburn, C.J. in the Queen's Bench Division, of Brett, L.J. in the Court of Appeal and on the opinion of Bowen, J. in the House of Lords. The judgments of the House of Lords, however, definitely rejected the judgments of the Queen's Bench Division, and the dissenting judgment of Brett, L.J. in the Court of Appeal (see especially the judgment of Lord Selborne at p. 801 where he also accepts the conclusion of all the Judges who attended the House with the possible exception of Bowen, J.) I do not, therefore, find that the reasons upon which Cox, C.J. based his decision very convincing.

The next case was that of *Ohna Mohamed Abubaker v. Tho Yan Poh and Others,*[6]. In that case the plaintiff and the defendants both held 999 years' leases from the Crown, and the plaintiff claimed a right of support for his buildings after over twenty years' uninterrupted enjoyment. The case was tried in 1914 before Bucknill, C.J. who held (p. 45) that the principles of English law laid down in *Dalton v. Angus*[1] should be in the main applied in the Colony. The main difficulty which the learned Chief Justice had to consider was whether the fact that the Crown was the reversioner with regard to both tenements prevented the principle from being applied. He finally decided that a tenure for 999 years so closely approximated to a freehold tenure that the principle would apply. Generally speaking, however, a lawful origin for an easement can only be presumed when the owner of the servient tenement is an owner in fee simple (see per Romer, L.J. in *Kilgour v. Geddes,*[8] at p. 467). This case was cited in argument but is not referred to in the judgment of Bucknill, C.J. However that may be, this difficulty does not arise in the case now before the Court where the defendant's title is a grant in perpetuity. On the general principles to be applied the decision is an authority in favour of the plaintiffs.

The third case is that of *Angullia v. Ong Boon Tat & Others,*[7]. This was also a claim to an easement of light after more than thirty years' uninterrupted enjoyment. The case was heard before Sproule, J. who followed *A. G. v. Lim Chin Swi,*[5] and decided in the defendant's favour, dissenting from Bucknill, C.J's decision in *Ohna Mohamed Abubakar's* case. There are, however, various passages in the judgment which are relevant to the case now before the Court. The learned Judge considers the case of *Dalton v. Angus,* in the following passage at p. 195:—

"The rule stated in *Dalton v. Angus* amounts to this, that twenty years of enjoyment of the right to support *nec vi, nec clam, nec precario* confers an indefeasible title. This rule was adopted and applied to the Colony by Bucknill, C.J. in the local case referred to.

"As for *Dalton v. Angus,* I think there can be no doubt that the majority in the House of Lords did uphold, as a correct statement of the law, the ruling at the original trial given by Lush, J. in his summing up to the Jury. That rule is set out in page 803 of the report, in these words:—

> "The authorities oblige me to hold that when a building has stood for twenty years it has acquired a right to the support of the adjacent land....nor does it rest on the facts of there being an implied grant. I think it has become absolute law that when a building has stood for twenty years, supported by the adjacent soil, it has acquired a right to the support of the soil...."

"The Lords by a majority sustained the principle of the doctrine of presumption of lost grant, but it was held that even if the right be based upon the presumption of a grant, the presumption was absolute after twenty years' enjoyment of the right of support, and not to be rebutted by showing that no grant had, in fact, been made."

It will be seen that the view taken by Sproule, J., except possibly as to the last passage quoted above, accords exactly with the view which I have put forward earlier in this judgment. The learned Judge did not, however, in the case before him, follow the principles laid down for three reasons:—

(i) *Dalton v. Angus* dealt with support and not light;

(ii) the rule in *Dalton v. Angus* being based on prescription, is contrary to the policy of the law in the Colony; and

(iii) *A. G. v. Lim Chin Swi* was binding on him.

As regards (1), the learned Judge relied on the decision in *Wheaton v. Maple,*[2]. In that case the plaintiff had built certain premises in 1852 and obtained a conveyance of the fee simple. The defendants were entitled to a lease of 1826 for 99 years granted by the Crown. In 1892 they surrendered the remainder of the lease and entered into an agreement with the Crown to erect a building. On completion of the building the Crown would grant a new lease for 80 years from the 5th July, 1892. The new building would have admittedly interfered with the plaintiff's 'ancient lights', and the plaintiff sought to restrain the defendants by injunction. The claim failed, because in 1852, when the plaintiff's premises were erected, the Crown was not in possession, having parted with the ownership in 1826 for a term of 99 years. In these circumstances the Court refused to presume a grant or contract by the Crown in 1852. On the other hand, no grant or contract by the lessees, valid as an easement, could be presumed in the case of an owner for a term of years. The easement must be absolute and bind everyone interested in the property. I would refer to the judgment of Lindley, L.J. at page 63 where he says: "It is true that it has been said that after an interrupted enjoyment of light for twenty years, a covenant not to interrupt will be presumed, *Cross v. Lewis,*[12] and *Moore v. Rawson,*[13]. But I am not aware of any authority for presuming as a matter of law a lost grant by a lessee for years in the case of ordinary easements, or a lost covenant by such a person not to interrupt in the case of light, and I am certainly not prepared to introduce another fiction to support a claim to a novel prescriptive right. The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt, by or with any one except an owner in fee."

In the case before Sproule, J. both parties were, or held under, lessees from the Crown for 999 years, and to that extent *Wheaton v. Maple* was a relevant authority. I can see nothing, however, in the latter case inconsistent with the general principles laid down in *Dalton v. Angus.* As pointed out earlier in this judgment, the presumption of a lawful origin for an easement of support can always be rebutted by showing that at the time of the alleged commencement of the easement there was no owner of the servient tenement in a position to grant it.

Sproule, J's suggestion that the policy of the law in the Colony is opposed to the recognition of easements appears to be based on the fact that the provisions in the Indian Limitation Act relating to easements, and adopted in India from Lord Tenterdon's Act, are omitted from the Colony Limitation Ordinance. I have already dealt with with the corresponding Limitation Enactment of the Federated Malay States. The passing of the Prescription Act in 1832 did not do away with the Common Law so far as concerns easements, and since the Common Law generally applies to the Colony as it does in the Federated Malay States, the absence of a Prescription Act, or any other similar provision, cannot affect the question one way or the other.

The decisions in the Colony are not of course binding in the Federated Malay States and are, in any case, not binding on a Court of Appeal, though they will naturally be treated with the greatest respect where they are in *pari materia*. It will be seen that the only decision in the Colony dealing with the easement of support is in favour of adopting the principles of *Dalton v. Angus*. As regards the decision in the other two cases, I agree with the view of *Dalton v. Angus* taken by Sproule, J. in *Angullia's case*, and must respectfully dissent from the view of *Dalton v. Angus* taken by Cox, C.J. in the earlier case and which is based on the judgments which were reversed or not approved in the House of Lords. I have above expressed the opinion that the fiction of a lost grant is not essential to the proof of the Common Law right of support. I would, however, point out that if such a fiction must be maintained as a condition of giving effect to the presumption, the position is different in the Colony and the Federated Malay States. In the Colony such a grant would require registration in the Register of Deeds. In the Federated Malay States no such grant can be registered in the Register of Titles. Where the grant requires to be registered it has been held in the Colony, in the case of easements of light, that absence of registration rebuts the presumption. That argument cannot apply in the Federated Malay States where the grant or other document is incapable of registration. The fact, therefore, that it is not and cannot be registered is not evidence that it did not exist.

On the case generally it cannot be disputed that easements of support, light, etc. have been recognised in all civilised communities as a necessary concomitant of property for over 2,000 years. They were recognised by the Roman Law and are recognised by the Common Law of England. As the Common Law of England has been in effect followed in the Federated Malay States since a Supreme Court was established and now has statutory recognition, I think that it should be presumed that these well recognised incidents of property should be deemed to exist unless excluded by express and unmistakable provisions. I cannot find any such clear and unmistakable intention in the Land Code, and accordingly consider that the Common Law principles can be applied.

As regards the alternative claim in trespass, there was considerable force in the appellants' argument that the weight of the evidence was strongly in their favour. The trespass, if any, was however of minute dimensions, and as in the view I take of the case the question does not arise, I prefer to express no opinion.

The appeal will be allowed with costs here and below. There will be judgment for the sum of $4,630. The deposit will be paid to the appellants or their solicitors. There will be a certificate for the taxation of costs on the higher scale in the case of each hearing, and a certificate for senior counsel in the Court of Appeal.

Horne, J.—The appellants are the executors of Yong Nee Chai, who in 1905 bought the land and building, No. 19 Cross Street. The respondent Fung Poi Fong bought the adjoining land and building, No. 21 Cross Street, in 1936. At that time he had three certificates of title Nos. 914, 915 and 922, referring respectively to lots 1, 2 and 66 in section 12; lots 1 and 2 adjoin No. 19, which is lot 68. He surrendered the three certificates and obtained a grant, No. 12099, dated 24th January 1938, and the three lots were apparently renumbered as one lot viz. 128. There is no evidence as to when he began to demolish the building No. 21, but by the 19th of February 1938, demolition was complete except for the dividing wall between No. 19 and No. 21. He then proposed that a party wall should be built, but the negotiations, interrupted by the death of Yong Nee Chai, resulted in a final refusal by the appellants in November 1938. In the course of these negotiations each party claimed the wall as his property and that matter remained in dispute. In February 1939 the respondent resumed building operations. The appellants were then advised by their architect that the wall in question was structurally independent from their building, and they desired to negotiate again; but the respondent well knowing the danger of removing the wall continued with the work of taking down the wall, strutting the floors and roof of the appellants' house from within and shoring it from without and digging the foundations required on his own land. The strutting was "inadequate" and the shoring was "farcical". When Mr. Jennings, the Building Inspector, saw the place on the 9th February he formed the opinion that No. 19 was then unsafe. It is uncertain how far the excavations had proceeded at that time, but the photograph Exhibit P14, taken on the 13th February, shows five trenches. Mr. Jennings speaks of having ordered these to be regraded on the 12th February. That they must have been commenced prior to the taking down of the wall is probable, but it is impossible to say in what state they were on the 9th February when Mr. Jennings decided that he would apply to the Sanitary Board for the prohibition order under section 76 of the Sanitary Boards Enactment. It is obvious that the respondent's excavations made the building more dangerous. But apparently Mr. Jennings had no

knowledge of the pier subsiding in consequence of the excavations until the 12th or 13th February and his opinion was formed without such knowledge. Mr. Coltman's opinion was that apart from the excavations the appellants' building was not unsafe. This opinion was rejected at the trial. The most that could possibly be said is that if the respondent had taken the proper measures he could have made the building safe after the removal of the wall, but that degree of safety had not been reached on the 9th February. The respondent, however, is not shown to have been aware of the opinion of Mr. Jennings or of the order of the 11th February until after the final act complained of, viz. the subsidence of the pier. Again it is not clear whether Mr. Jennings's opinion is based solely on the fact that the support, rendered by the respondent to replace the loss of the support from the wall, was, as he states, farcical. But I assume it to be so based to a large degree, for in his re-examination he says: "On 9th it was unsafe owing to demolition. "Method of demolition and unsuitable shoring. Could have been adequately shored up as it was on the other side". The notice therefore would not necessarily result in demolition of No. 19. In cross-examination also he states: "On 9th I inspected the building. In my opinion the premises should be vacated. I made a report and asked for Chairman's order. Chairman had a look and signed notice on 11th. Notice posted on building and owner on 13th. On 13th pier slipped. This warranted demolition, made it doubly dangerous. I should have advised demolition if pier had not slipped". Again in examination-in-chief he says: "After the wall (was) demolished No. 19 (was) in such a condition as required demolition. Shoring inadequate. Load taken off. Lateral support removed. When I saw the wall on the 8th it was already 5/8ths demolished". It may be there is some mistake about the date here, for he also says his first visit was on the 9th.

It does not appear to me therefore that demolition of the appellants' building was a certainty on the 9th February. Mr. Jennings's statements taken together do not amount to that. He says in effect: 'I should have advised demolition if the farcical shoring had not been quickly converted into satisfactory shoring'. Before, however, any steps could be taken, before even the notice of the 11th was served, the building was rendered "doubly dangerous" by the withdrawal of the lateral support of soil and the consequent subsidence of the pier. When that had happened a demolition order became inevitable.

Consequently there are two causes of action, one arising from the removal of the wall which cause may be said to arise on the 9th February under which the plaintiffs could claim compensation for the cost of making their building safe; another arising on the 13th when the damage resulting from the excavation renders a demolition order certain and gives rise to the claim for the value of the building. But the right to support is in each case the same (*Lemaitre v. Davis,*[14]).

The evidence as to the age of the plaintiffs' building is not definite. Mr. Vass, the defendant's architect, thought that the plaintiffs' building had been erected first as a one-storied building. According to Mr. Jennings, the Building Inspector, there was no record of any structural alteration since 1893 but he thought that the records might not be accurate prior to 1904; he also said that the mud wall of the one-storied No. 19 had been built in accordance with an old bye-law; but he did not give the date of it. One witness, 66 years of age, attempted to depose that he knew the house 42 years ago in its present condition but admitted under cross-examination that he did not know it before 1906. There is no finding upon this evidence by the learned Chief Justice, who regarded the matter as one of support by buildings for buildings and did not go into any consideration of the English law because he considered that other provision had been made by local enactment. The respondent led no evidence as to the commencement of the enjoyment.

I think therefore a fair inference from the evidence is that No. 21 must have been built and the additional storey built on to No. 19 about 40 years ago. There is no loss of support to No. 19 as a one-storied building.

It is impossible therefore to find that the two buildings were erected before the time of living memory and that their origin could not be proved, because apart from the evidence of these witnesses, it is obvious that the town of Kuala Lumpur was only laid out within living memory. It is probable that there are few, if any, buildings in the towns of the Federated Malay States that could be called "ancient" i.e. erected before the time of living memory. But whether that is so or not, a right claimed by prescription at common law (that is, *not* under the doctrine of the lost modern grant) can be defeated by shewing that it did not or could not exist since the commencement of legal memory i.e. time immemorial. In the present case, as in *Dalton v. Angus,*[1] it would appear that the appellants must rely on what Lord Blackburn at page 810 describes as "the comparatively modern doctrine by which enjoyment of a right appurtenant to land for twenty years or more, under such circumstances as are required by law, is given the effect of prescription, though it is proved that the enjoyment began within living memory".

I would also cite and adopt the following passages in the judgments of Thesiger, L.J. and Cotton, L.J. at pages 170 and 171 and pages 185 and 186 of the report in 4 Q.B.D.:—

Thesiger, L.J.:

"It may be that the commencement of the reign of Richard I. was originally fixed as the period of prescription for incorporeal rights by analogy to the statute 3 Edw. 1, c. 39, which fixed the same period for alleging seisin in a real action, and there are dicta to be found in the books supporting the view that as a matter of theoretical law the same analogy carried with it an alteration as regards incorporeal rights, when the period of sixty years was fixed for a writ of right, and fifty years for a possessory action by 32 Hen. 8. But, as a matter of practical law, this analogy does not appear to have been extended by the courts to these last-mentioned statutes. The reign of Richard I. still remained the time, to which legal memory in regard to easements was supposed to relate, and although the later statute of 21 Jac. 1, c. 16, did undoubtedly suggest to the minds of the judges the propriety of giving to twenty years' uninterrupted enjoyment of incorporeal rights an effect to some extent at least commensurate with that produced by a similar enjoyment of land, they seem to have been unwilling, probably for good reasons, to go the whole length of applying the statute by analogy, notwithstanding that if they had done so they would have followed the example set them by their predecessors in respect of the statute of Edward I. They effected the object which they had in view by the creation of the fiction of a grant made and lost in modern times. Such a fiction, like other fictions, may be open to the strictures passed upon it, although, I must add, that it has had in my opinion in many respects a beneficial operation, and is, after all, but an extension of the fiction, which had previously formed the basis of prescriptive titles, for every prescription imports a grant which in most cases no one believes in. But whatever may be the merits or demerits of the fiction, it is too late to question the validity of its introduction. The doctrine of lost grant forms part of the law of the land, and any dislike which may be felt for this and like fictions cannot be allowed to interfere with the carrying out of the doctrines involved in them to the full extent, which has been sanctioned by established authority".

Cotton, L.J.:

"These means are either an enjoyment beyond living memory, from which in the absence of evidence to the contrary enjoyment before the time of legal memory would be presumed, or by enjoyment for such a time as would be sufficient in the absence of evidence to the contrary to justify a presumption of a modern grant which has been lost. In the present case the building had been for twenty-seven years in the estate, in which it was, when the act of the defendants, which is the foundation of the action, was done.

The question of enjoyment beyond the time of living memory does not arise, but there had been upwards of twenty years' enjoyment, and this is sufficient to raise a presumption that the enjoyment has been under a modern lost grant. This is, no doubt, liable to be rebutted, and in my opinion the real question on this part of the case is, what evidence is sufficient to rebut the presumption."

There is no dissent from these statements of the law in the House of Lords' Report. They appear to have been approved by Lord Selborne at pages 800 and 801 where he says:—

"Supposing, however, that the 2nd section of the Prescription Act ought not to be held to apply to the easement of support, the same result would practically be reached by the doctrine, that a grant, or some lawful title equivalent to it, ought to be presumed after twenty years' user. As to this, I think it unnecessary to say more than that I agree with the view of the authorities taken by Lush, J., by the majority of the judges in the Court of Appeal, and by all the learned Judges who attended this House (unless Bowen, J., who preferred to rely upon the equitable doctrine of acquiescence, is an exception) in their answer to the first two questions proposed to them by your Lordships".

I agree with that part of the argument of Mr. Shearn, which is to the effect that the Appellants have only to shew 20 years' enjoyment and it is for the respondent to rebut the presumption that arises from it if he can; but I do not agree that we are entitled to presume from the enjoyment proved "the existence of the right from time immemorial" (Hailsham, volume XI, paragraph 534, page 294) so as to say that the appellants have established "a right springing out of the enjoyment at common law". (Gale, 11th edition, page 392). We are entitled to presume a grant made and lost in modern times which is of course a fiction. This presumption is, however, hedged about with certain rules; but, provided that none of these apply to defeat the presumption, the period of enjoyment or user which, in theory, is only evidence on which a grant may be presumed becomes in practice conclusive. The general principle of the law is that where an incorporeal right or an easement has been enjoyed for more than twenty years, the Court will presume a legal origin for such enjoyment if a legal origin is possible; and the doctrine of a lost modern grant is a modern subdivision of the wider principle and is in general only ancillary to a claim to prescription at common law, being applicable to cases of enjoyment commencing within living memory.

The appellants therefore, according to modern practice, should have pleaded that they claimed the right by presumed lost grant. But no harm has been done to the respondent by not so doing. And the appellants have had to argue the appeal on that basis. They cannot support their claim in any other way.

Mr. Braddell, for the respondent, argues most forcibly that a lost grant cannot be presumed because, apart from registration, the registered proprietor of the servient easement could not legally grant an easement; and that from an examination of the Land Code and those enactments which it superseded, it should be inferred that the Legislature intended that no such rights as the right claimed in or sought to be established by this suit should exist in the Federated Malay States.

Mr. Shearn's arguments follow more or less the grounds of appeal. I reject his argument that section 42 (vi) of the Land Code lets in the application of the common law. In my view an indefeasible title means a title which cannot be made null and void in the first place by anything and then only by the provisions creating exceptions. A defeat by operation of law therefore means a total defeat.

I think it is necessary to consider the nature of the right claimed, the method of establishing it, and whether the Land Code prevents the application of the common law, but a complete separation of each topic is not possible.

Lord Blackburn says (*Dalton v. Angus,* page 808) that the right is more properly described as a right of property which the owner of the adjoining land is bound to respect than as an easement, or a servitude *ne facias,* putting a restriction on the mode in which the neighbour is to use his land; but whether it is to be called by one name or another is more a question as to words than as to things. Lord Selborne describes the acquired right to support an easement but he also describes the natural right of support as a natural easement. *Bonomi v. Backhouse,*[10] decides that the right of the owner of a building to support for it, when acquired, is precisely the same as that of the owner of the land to support for land. The right of support for buildings from land or buildings even though called an easement, is therefore in the nature of an inherent right, an incidence of ownership and is closely connected with the visible user of the land. It is an incorporeal right but is not an interest in land. A right of way or a right of passage for water may on the other hand be an interest in land. The removal of the soil or the building giving the support gives no right of action, for if by artificial means the damage can be prevented no cause of action arises (*Bower v. Peate,*[15]) and that I think also shows that the right is not an interest in land. The existence of this right does not affect the title of the owner of the servient tenement, and the right is not an interest carved out of his estate. It is in a sense an encumbrance upon it, but visible or easily ascertainable and not of the nature of such types of encumbrances as leases and charges, which are capable of a separate possession and ownership.

As to the method of establishing the right, it must in this case be under the doctrine of the lost grant. I have already dealt with this at some length, and I now propose to consider whether any of the rules governing the application of the presumption will apply so as to defeat the presumption.

These rules are set out in Hailsham, volume XI, paragraphs 543 and 548; there is no need to refer to them all. The principal one is that the presumption is not rebuttable by shewing that no grant was ever made. The user must be open, as of right, and uninterrupted and that is so in this case; and as to the argument that there is no fee simple that will be dealt with when I come to deal with the Land Code.

In passing I would, however, refer to two Colony cases in which the Court has refused to presume a lost grant. *Attorney-General v. Lim Chin Swi,*[5] was a case of light where the Court was asked to presume a lost grant in favour of the Crown, the owner of a school. Adjoining the school was land held by the defendant on a fee simple grant from the Crown dated 1850. The school was built in 1878, so there had been more than 20 years' enjoyment of the light. In my opinion the judgment in this case proceeds upon a view that the grant which may be presumed is an actual grant whereas a Court is asked to presume a fictitious grant, which is assumed to be necessary to give a legal origin to the period of enjoyment. The learned Chief Justice who tried the case refers to an affidavit shewing that from 1850 no grant appeared in the Registry of Deeds. I think the view expressed by the majority in the Court of Appeal in *Dalton v. Angus,*[1] has not been dissented from in the House of Lords and is good law viz. that direct evidence that the grant was never made is inadmissible to rebut the presumption of a lost modern grant raised by the twenty years' enjoyment. And with regard to support, that view appears to be confirmed by Lord Blackburn at page 826:—

> "Now, if the motive for introducing prescription is that given in the Digest, lib. xli., tit. 3, art. I, quoted before, I think it irresistibly follows that the owner of a house, who has enjoyed the house with a de facto support for the period and under the conditions prescribed by law, ought to be protected in the enjoyment of that support, and should not be deprived of it by shewing that it was not originally given to him. And I think that the decisions ending in Backhouse v. Bonomi, which is put in a very clear light by Manisty, J., in his opinion, decide that he should not be deprived of it. Fry, J., thinks those decisions are contrary to principle, but too strong to be departed from, I have come to the conclusion, for the reasons I have given, that they are founded on principle".

In *Angullia v. Ong Boon Tat,*[7], *Attorney-General v. Lim Chin Swi*[5] is followed, but appears to be dissented from in *Ohna Mohamed v. Tho Yan Poh,*[6].

The object of the presumption is to give effect to the acquiescence of the owner of the servient tenement which is in the nature of estoppel by conduct, and that object is defeated and the fiction destroyed if evidence can be admitted to prove that an actual grant was never made.

I should hold that this is certainly a case where a lost grant should be presumed and that the right of support was established. Unless therefore it can be shewn that the Land Code operates to prevent the establishment of the right of support under the doctrine of prescription, the present case is eminently one in which a grant should be presumed, and it should be held that the right to support has been established.

The next thing is to consider the Land Code with regard to the two topics previously considered viz. the nature of the right and the mode of acquisition. In so doing full effect must also be given to the Civil Law Enactment section 2 (i). We have to apply both Enactments. I take it as conceded that although the Civil Law Enactment came into force in 1937 the practice of the Courts in the Federated Malay States was to apply English law when local legislative provisions or local customs did not supply the law; and that therefore nothing turns upon its date of commencement. And assuming that the facts of the case are sufficient to raise the presumption of a lost grant, I can see no difference between this case and a like case brought before 1926, when the former Registration of Titles legislation was in force. Under that enactment it is submitted that you could protect an easement by caveat, but only in my opinion if it were an interest in land. Under the present Code you cannot protect by caveat any interest in land but only a registrable interest. This land legislation is largely procedural, providing methods for obtaining land from the State, and for registration of the title granted and of certain definite interests such as leases and charges. There is no provision for registration of anything other than the fixed classes of encumbrances which can be created and transferred by a statutory instrument.

One argument is that the title granted is not, or is not equivalent to, a fee simple and as you can prescribe for an easement only against an owner in fee there is nobody to prescribe against. It is, however, a sufficiently permanent title and is the highest possible in the system and I see no incongruity in one owner prescribing for a right of support from the land of another owner of the same title, for by section 2 of the Civil Law Enactment we are entitled to adapt the common law to the local circumstances. The presumed intention of the original proprietors at the time of the commencement of the user is to create a perpetual easement. It would of course be possible to have express grants of easements registrable. In some systems it is effected by a charge, but the Federated Malay States system has no provision whatever.

Another argument for the respondent is based upon a consideration of the various Limitation Enactments, which have been and are now in force, and upon section 43 of the Land Code. The effect of it may be put summarily: 'Title to land cannot be acquired by adverse possession; therefore an easement cannot be acquired by prescription. The Limitation Enactment is comprehensive. Formerly a person in possession of immovable property could defend himself but could gain no title. To-day you cannot by reason of section 43 defend yourself against a registered proprietor. Therefore you can acquire no easement in the Federated Malay States'.

The present law is contained in Chapter 138 section 43 and Chapter 18 article 103.

If the right of support is regarded solely from the point of view of the burden on the servient tenement it may be said to derogate from the title of the proprietor of that tenement. But as I have already said the proprietor of the dominant tenement obtains no interest in his neighbour's land. He has use and enjoyment of support from it, but no control over it. He has no more than the right of suing his neighbour if the withdrawal of the support cause him damage. He has no true legal possession of an interest in the servient land: nothing from which he could exclude all the world. Only when attacked can be alleged his past enjoyment and consequent acquisition of the right. As I see the matter the appellants make no claim to derogate from the title of the respondent or to dispossess him of any part of his land or to have any interest in it: they merely claim a right not to be disturbed in the enjoyment of their own land and to have acquired that right by enjoyment for more than twenty years. The respondent's title is not the least affected. He may transfer or lease or charge his land without restriction. During the last twenty years it has changed hands twice and, according to the expert witnesses, it would be obvious to each purchaser that it was supported by and received support from the adjoining building. As affecting the appellants the Limitation Enactment can only be brought into the matter after the right of action has arisen. It is negative prescription; the claim here is based on positive prescription. The respondent has never been out of possession of No. 21 Cross Street and the appellants have never had and are not claiming possession. It would be giving a false and strained construction to both the Land Code and the Limitation Enactment to hold that such enactments affect the acquisition of the right of support under the doctrine of positive prescription.

It is also said that the respondent by surrendering the land to the State in January 1938 would by so doing defeat the right of the appellants. Certainly he obtained a new grant. Apart from the wall, he had demolished the building on the three lots before he wrote to the appellants on the 19th February suggesting a party wall. This surrender is difficult to understand. The grant is expressed to be made in consideration of the surrender and the payment of $895.00 is dated the 24th January 1938 and the old certificates of title are endorsed as having been surrendered on the 26th January. There is no evidence of the form of surrender apart from the word "surrendered" in the memorials on the old documents of title. But the transaction appears more aptly to fall within section 101, that is "combining", and the document of title to be issued in place of the three delivered would then have been a subsequent certificate under section 63 (ii). I should be surprised to learn that the authorities would contemplate anything other than the surrender of an empty site even if the transaction was in fact a formal surrender. But if it was a formal surrender we must assume that the respondent surrendered the building with the land and received a new grant of the same. If therefore the right of the adjoining owner to support is valid and is something that has to be considered from title in the technical sense of that word, such right would subsist during the moment the land was in the hands of the State and continue under the supposed new grant. But the manner in which the transaction is carried out indicates combining of lots, merely an exchange of three documents of title for one. The surrender has no effect on the respective rights of the adjoining owners.

It is also submitted that section 55 precludes the acquisition of easements by prescription by declaring that land . . . . shall not be capable of being dealt with otherwise than in accordance with this enactment. "Dealing" means "any transaction of whatever nature by which land is affected under this or any previous Land etc. enactment and includes a caveat". This is a wide definition but it is limited to transactions by which land is affected under the enactment. It must also be considered in its context. It can mean at the most no more than the corresponding section—section 4 of the 1891 Enactment—which was considered in *Haji Abdul Rahman v. Mahomed Hassan,*[4] where at page 214 Lord Dunedin said that

> "it does not profess to prohibit and strike at all contracts in reference to land, provided such contracts cannot be construed as attempting to transfer, transmit, mortgage or charge or otherwise deal with the land itself. In other words it is contracts or conveyances which but for the section might be held to create real rights in a party to the contract or conveyance which alone are struck at".

Before a grant or its equivalent can be presumed the capacity to have made such a grant must have existed in some person at the beginning of the prescriptive period. Assuming an actual grant of a right of support such a grant cannot be construed as an attempt to deal with the land itself. It gives no interest in the land. Section 55 has no effect upon it. It will exist and have legal force by virtue of the common law and its effect will pass with the land because the user is open. It will be of no avail to a successor of the grantor, who buys the building to say I had no notice of it, for the circumstances of the user would put him upon enquiry. I also think that "otherwise dealt with" is limited by the words "transferred, transmitted and charged" which precede it. To say of this section that it precludes a registered proprietor from agreeing that his land or his house should give support to his neighbour's land and house or that it precludes adjoining owners from agreeing to build so as to have mutual support, is not warranted by the language used. Such a construction would forbid the creation of many useful easements known to the law, would forbid party wall agreements and so on and many other useful contractual arrangements.

The Code gives a warranty of title but the claim of the appellants is not against the title of the respondent, who is at full liberty to transfer and charge and lease his land under the Code and to make contractual arrangements outside of the Code. The actual provisions of the Code are of course in substitution of the common law, that is, so far as those provisions extend; but those provisions in my opinion, even with the aid of other local legislation, *in pari materia,* cannot be construed to include any topic or matter not clearly within their purview. The Civil Law Enactment allows us to apply the common law and rules of equity, and I can find nothing in the Land Code to prevent the right of support being established in this suit under the doctrine of prescription.

The appellants also claimed in trespass based upon the allegation that the wall encroached upon the appellants' land—a tapering encroachment from about 2 inches wide at one end. No measurement of the thickness of the wall was made, and there is no evidence as to the actual size of any brick. But if the bricks were all about 9 inches then the space between the black line and the red line on the eastern side of plan Exhibit P7 is said to be not enough to accommodate a brick wall supposed to be of 9-inch bricks. I do not think suits for trespass should rest upon such

doubtful inferences of fact. The learned Chief Justice held that the trespass was not proved. I agree with that finding.

The appellants although they pleaded their claim in negligence, did not press that side of it and it has not been dealt with. But if it is to be held that the appellants have not acquired a right of support, that the law of the Federated Malay States permits no such rights, I cannot think that the title to land, which is said to be so limited, would give adjoining owners of terrace houses a right to dig down their neighbours; for the common law would find a remedy based on the maxim *sic utere tuo ut alienum non laedas.*

The appeal should be allowed with costs and judgment of the Court below set aside and judgment be given for the plaintiffs for $4,630.00 and costs, such costs to be taxed on the higher scale. The deposit will be paid out to the appellants or their solicitors.

Gordon-Smith, Ag. J.A.—I have had the advantage of reading and studying the judgment of the learned Acting Chief Justice of the Straits Settlements. This judgment so fully accords with the opinion and views I had formed on the various points raised and arguments put forward thereon, that it seemed to me, not only unnecessary but also undersirable, to continue with the preparation of the separate judgment which I had then commenced to write; unnecessary, because such judgment so adequately and decisively deals with every point raised before us, and undesirable, because had I attempted to deal with these same points in different but in phraseology least adequate and lucid than that contained in the judgment of the President, doubts might possibly have arisen subsequently as to whether I was in complete agreement with the reasons given for this decision. Moreover, it appears to be a growing and, in my opinion, an eminently desirable practice that where there is unanimity between Judges of Appeal in arriving at a decision, there should be only one judgment, unless in arriving at such unanimous decision, there are extremely important and conflicting differences of opinion in the manner of so doing.

For these reasons I content myself with saying that I agree entirely with the judgment of the learned President and in the order proposed.

Appeal allowed.